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THE ICC MOOT COURT COMPETITION 2020

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**International
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No.: ICC-01/_____

THE APPEALS CHAMBER

**SITUATION IN SOLANTIS
IN THE CASE OF
*THE PROSECUTOR v. CERSEI BANNISTER of VALARIA***

**PUBLIC DOCUMENT
WRITTEN SUBMISSIONS ON BEHALF OF THE STATE OF VALARIA**

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LIST OF ABBREVIATIONS

AC	Appeals Chamber
PTC	Pre-Trial Chamber
\$	United States Dollar
MT	Metric Tonne
UNSC	United Nations Security Council
ICC	International Criminal Court

INDEX OF AUTHORITIES

Cases

1. *Callixte Kalimanzira v. The Prosecutor*, ICTR-05-88-A, Judgement (Oct. 20, 2010).
2. *Decision on the Prosecutor's Application for Warrants of Arrest, Article 58*, Case No. ICC-01-04-168-US-Exp (July 13, 2006)
3. *Google LLC v. Commission nationale de l'informatique et des libertés*, E.U. Court of Justice C-507/17 (Jan. 10, 2019).
4. *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993).
5. *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Judgement (Sept. 2, 1998).
6. *Prosecutor v. Bagambiki*, Case No. ICTR-99-46-Tt, Judgement and Sentence (Feb. 25, 2004).
7. *Prosecutor v. Bikindi*, ICTR-01-72-0048/1, Judgment (Dec. 2, 2008).
8. *Prosecutor v. Blagojević*, IT-02-60, Judgment (May 9, 2007).
9. *Prosecutor v. Kajelijeli*, ICTR-98-44A-T, Trial Judgement (Dec. 1, 2003).
10. *Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of Charges (Dec. 16, 2011).
11. *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Judgment (Sept. 12, 2006).
12. *Prosecutor v. Nahimana*, ICTR-99-52-T, Judgment and Sentence (Dec. 3, 2003).
13. *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgment (Dec. 13, 2004).
14. *Prosecutor v. Niyitegeka*, ICTR-96-14-T, Judgement (May 16, 2003).
15. *Prosecutor v. Ngudjolo Chui*, ICC-01/04-02/07, Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, ICC Pre-Trial Chamber I (Jul. 6, 2007).
16. *Prosecutor v. Nyiramasuhuko*, ICTR-98-42-T, Trial Judgement (Jun. 24, 2011)
17. *Prosecutor v. Nyiramasuhuko*, ICTR-98-42-A, Judgement (Dec. 14, 2015)
18. *Prosecutor v Rutaganda*, ICTR-96-3-T, Judgment (Dec. 6, 1999).
19. Regulations of the office of the prosecutor ICC-BD/05-01-09 Reg.29-2.

20. *Situation in Myanmar*, ICC-RoC46(3)-1/18, Decision on the “Prosecutor’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” ICC Pre-Trial Chamber I (Sept. 6, 2018).
21. *Situation in the Republic of Côte d’Ivoire*, ICC-02/11, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, Pre-Trial Chamber III, (Oct. 3, 2011).
22. *The Case of the S.S. “Lotus”*, Permanent Court of International Justice (Sept. 7, 1927).
23. *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 379 F.3d 1120, 2004 U.S. App. LEXIS 17869, 32 Media L. Rep. 2185 (9th Cir. 2004).

Statutes and Treaties

24. Hiram Abtahi, Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (2008).
25. United Nations, *Draft Statute for an International Criminal Court with Commentaries*, (1994).
26. United Nations, General Assembly, *Convention on the Prevention and Punishment of the Crime of Genocide*, (Dec. 9, 1948).
27. United Nations, General Assembly, *International Covenant on Civil and Political Rights*, U.N.T.S. 14668, (Dec. 16, 1966).
28. United Nations, General Assembly, *Rome Statute of the International Criminal Court* (as amended 2010).
29. United Nations, General Assembly, *Universal Declaration of Human Rights* (Dec. 10, 1948).
30. United Nations, Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia* (as amended on May 17, 2002).
31. United Nations, Security Council, *Statute of the International Criminal Tribunal for the Rwanda* (as amended on Oct. 13, 2006).
32. United Nations, *Vienna Convention on the Law of Treaties* (May 23, 1969).

Articles

33. Emma Irving, *Suppressing Atrocity Speech on Social Media*, 113 AJIL Unbound (2019).
34. Fausto Pocar, *Symposium on the Rome Statute at Twenty: Transformation of Customary Law through ICC Practice* (2018).
35. Zimmerman & Klamberg, ICC Case Matrix, Rome Statute Commentary (last visited Nov. 16, 2019), <https://www.casematrixnetwork.org/cmnn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/#c1983>.

STATEMENT OF FACTS

I. The State of Valaria’s Interest in this Appeal

The Prosecutor of the International Criminal Court (ICC) is seeking to prosecute a case against a national of Valaria, a non-party to the Rome Statute, for harms that occurred outside of Valaria in Solantis. Such a prosecution would violate Valaria’s state sovereignty, and as such, the State of Valaria has an interest in this appeal concerning the alleged acts of Valarian national, Dr. Cersei Bannister (PhD).

II. State Overviews: Valaria and Solantis

Valaria is a technologically advanced nation, while neighboring Solantis is a developing nation. Although the Valarian language is used in both states, the dialects differ. Valaria’s population is ethnically Nothroki, while Solantis’ population is ninety-seven percent Nothroki and three percent Starek.

III. Dr. Cersei Bannister, CEO of Statusphere

Dr. Bannister is the founder and CEO of Statusphere, a Valaria-based, online social networking platform. Statusphere is headquartered in Valaria, where all of its servers are located. Despite having nearly ten million users (seventy percent of whom are located in Valaria), Statusphere has a staff of just eighteen employees, a few of whom serve as content monitors. Content monitors screen for threatening posts to enforce the company’s community standards policy, under which content posing a “genuine risk of physical harm,” or “direct threats to public safety” is removed.

In order to view the content posted on Statusphere, individuals must first access the website, create a username, and select a password. At this point, users have access to the general Statusphere platform, but not to posts made within Statusphere’s private affinity groups. To view or post to the affinity group e-bulletin boards, Statusphere users must create a second alias and request to join the group of interest. Once a member of an affinity group, users may view and post on the group’s e-bulletin. These e-bulletins are not visible to the general public, nor are they visible to Statusphere users outside of the group.

IV. Unrest in Solantis

In 2017, an anti-Starek extremist group using the name “Dragos” was formed. Thereafter in 2018, a private affinity group named “Dragos Initiative” appeared on Statusphere. The online group currently has approximately 4,000 members, fewer than .04% of Statusphere’s user base. In Solantis, between January and May of 2019, 150 Stareks were killed by violent extremists.

In May of 2019, the UN High Commissioner for Human Rights (UNHCHR) reported that posts made in the Dragos group on Statusphere were linked to the anti-Starek attacks, explaining that the term “widget,” which appeared in the posts, referred to the Starek people. The day after the UNHCHR released its findings, Dr. Bannister and the Statusphere team promptly removed the Dragos group from Statusphere. Soon after, a new Dragos affinity group was created on Statusphere. In June of 2019, a member of the group posted to the private e-bulletin board: “it is time for a widget roast. Tonight – 7:00PM, 12 Liberty Blvd.” That night, a number of people gathered at the posted address outside a Starek worship center and threw incendiary devices, killing 200 people.

Upon learning of the incident, Dr. Bannister and the Statusphere team removed the group from Statusphere (though new Dragos groups continued to appear on Statusphere each time one was closed down). Following the incident at the Starek worship center, Dr. Bannister publicly explained that Statusphere’s content monitors had difficulty interpreting the dialect used in the Dragos e-bulletin message. The monitors had understood the message to be a call for “...those of faith to see the light.”

V. 2019 Solantis Elections

In November of 2019, the day before the Solantis national elections, a post on the private Dragos e-bulletin board stated, “go to the voting sites near the Starek trailer park communities and do what must be done to prevent the widgets from gaining power.” The Statusphere content monitors flagged this post; however, in light of the upcoming elections, Dr. Bannister and the Statusphere team determined the post was a call to campaign and vote. On election day, armed individuals fired into crowds of waiting voters, killing both Stareks and Nothrokis. Once the Statusphere team learned of the attacks, they promptly removed the newest Dragos group from the social media platform. Following the election, the Solantis parliament enacted a new law under which members of the Dragos group are being prosecuted.

VI. Procedural Posture of the Current Appeal

On January 5, 2020, Valaria's neighboring state, Solantis, requested that Valaria extradite Dr. Bannister for prosecution under a recently enacted Solantic law for her role in operating the Statusphere social networking website which was allegedly used by the third-party Dragos group linked to the unrest in Solantis. Valaria denied the request because the two countries have no bilateral extradition treaty, and because Valarian law does not criminalize Dr. Bannister's alleged conduct. Solantis, a State Party to the Rome Statute, referred the situation to the ICC for prosecution. On 15 March 2020, Pre-Trial Chamber VI confirmed the Prosecutor's charges against Dr. Bannister for incitement to genocide and aiding and abetting incitement to genocide under Article 25 of the Rome Statute, from which the instant appeal arises.

ISSUES RAISED

-I-

Whether there are sufficient grounds to establish that one or more of the posts by the Dragos group made on Statusphere, between January 2018 and January 2020, constituted direct and public incitement of genocide under Article 25(3)(e) of the ICC Statute.

-II-

Whether under Article 12 of the ICC Statute, the Court has the authority to base its jurisdiction on effects on territories through cyberspace connections in order to prosecute Dr. Bannister, considering that all of her relevant conduct occurred in her State of nationality, Valaria, which is not a party to the ICC and did not accept the ICC's exercise of jurisdiction.

-III-

Whether Dr. Bannister, CEO of Statusphere, can be held criminally responsible for inciting genocide under Article 25(3)(e) of the ICC Statute and/or providing the means to incite genocide under Article 25(3)(c) of the ICC Statute considering that the alleged inciting posts were made by third party users and that Dr. Bannister had no legal duty to censor Statusphere users online.

SUMMARY OF ARGUMENTS

- I. The Dragos posts on Statusphere do not constitute “direct and public incitement of genocide” under Article 25(3)(e) of the Rome Statute because they were neither direct nor public, the requisite genocidal intent cannot be established, and the underlying crime of genocide did not occur.**
- a. *The meanings of the Dragos posts were ambiguous and therefore were not direct as required by Article 25(3)(e).*
 - b. *The Dragos posts occurred in a private social media group which could not be viewed by the general public, and therefore were not public as required by Article 25(3)(e).*
 - c. *The requisite genocidal intent for incitement to genocide cannot be established.*
 - d. *The Dragos posts cannot constitute incitement to genocide because the underlying crime of genocide has not occurred, as the Court should require.*
 - e. *The posts on Statusphere were not sufficiently grave to meet Article 17 of the Rome Statute’s requirements for admissibility.*
- II. Even if this Chamber finds that the Dragos posts constituted incitement to genocide, Dr. Bannister cannot be held individually liable for either inciting genocide or providing means to incite genocide under Article 25(3) of the Rome Statute because she performed no acts or omissions with the requisite genocidal intent.**
- a. *Even assuming there were reasonable grounds to find that the Dragos posts constituted incitement to genocide, Dr. Bannister cannot be held liable for incitement under Article 25(3)(e) of the Rome Statute because the social media posts at issue were created by third party actors and she had no legal duty to remove them.*
 - b. *Dr. Bannister cannot be held liable for providing the means for incitement to genocide under Article 25(3)(c) of the Rome Statute because she lacked the requisite genocidal intent and did not purposely facilitate incitement to commit genocide.*
 - c. *Holding Dr. Bannister liable for third-party posts on Statusphere would violate international public policy by limiting free speech online and inappropriately deputizing non-State actors to police free speech.*

III. The ICC lacks jurisdiction under Article 12 of the Rome Statute because any relevant acts occurred in Dr. Bannister’s State of nationality, Valaria, a non-party State, and Statusphere’s online presence in Solantis does not provide a legal basis to establish jurisdiction.

- a. The preconditions for jurisdiction were not met because Dr. Bannister is a Valarian national, the “conduct in question” occurred in Valaria, Valaria has not accepted the ICC’s exercise of jurisdiction, and the situation was referred to the prosecutor by Solantis.*
- b. Neither the “effects” in Solantis nor “the cyberspace connection” between Solantis and Dr. Bannister’s acts in Valaria form a basis for jurisdiction, and finding otherwise would circumvent the jurisdictional limits of the Rome Statute and violate international public policy.*
- c. The Rome Statute does not recognize “effects” as a ground for jurisdiction and finding otherwise violated the legislative intent to limit the scope of the Court’s jurisdiction.*
- d. Relying on the internet connection between Valaria and Solantis for the purpose of jurisdiction would provide the ICC unlimited, worldwide jurisdiction, infringing upon state sovereignty.*

PRELIMINARY SUBMISSIONS

I. STANDARD OF REVIEW ON APPEAL

The State of Valaria appeals the PTC VI's Decision on Confirmation of Charges under Article 82(1)(a) of the Rome Statute of the ICC (Rome Statute).¹ "The function of the Appeals Chamber in respect of appeals brought under article 82 (1) (a) of the Statute is to determine whether the determination on the admissibility of the case or the jurisdiction of the Courts was in accord with the law."² The AC has held that it should intervene with a discretionary decision where "(i) it is based upon an erroneous interpretation of the law; (ii) it is based upon a patently incorrect conclusion of fact; or (iii) the decision amounts to an abuse of discretion," and the error materially affected the impugned decision.³

When a decision is based upon an allegedly erroneous interpretation of the law, such as PTC VI's in this instance, the AC must not defer to PTC VI's legal interpretation, but rather should arrive at its own conclusions as to the appropriate law and determine whether or not PTC VI misinterpreted the law.⁴ Specifically, the AC has the authority, in accordance with the discretion described in Article 64(9) of the Rome Statute, to freely assess all evidence submitted in order to determine its admissibility in accordance with Article 69.⁵

When a decision is based upon an allegedly incorrect conclusion of fact, the AC will intervene where the PTC VI committed a clear error by misconstruing facts, and the AC cannot discern how the PTC's conclusion could reasonably have been reached from the evidence before

¹ Rome Statute of the International Criminal Court art. 82(1)(a), Jul. 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

² *Prosecutor v. Kony et al.*, ICC-02/04-01/05-408 OA 3, Judgment on the appeal of the Defence against the "Decision on the admissibility of the case under article 19 (1) of the Statute," ¶ 80 (Sept. 16, 2009).

³ *Prosecutor v. Laurent Gbagbo*, ICC-02/11-01/15 OA 8, Judgment on the appeals of Mr. Laurent Gbagbo and Mr. Charles Ble Goude against the decision of the Trial Chamber I of 9 June 2016 entitled "Decision on the Prosecutor's application to introduce prior recorded testimony under Rules 68(2)(b) and 68(3)," ¶ 21 (Nov. 1, 2016) [hereinafter Gbagbo].

⁴ *Id.* at ¶ 22.

⁵ ICC, Rules of Procedure and Evidence, ICC-PIOS-LT-03-003/16_Eng (2002), Rule 63, [hereinafter Rules of Procedure and Evidence].

it.⁶ The AC may reverse a decision if it finds an erroneous interpretation of law or a patently incorrect conclusion of fact materially affected the PTC VI’s decision.⁷

II. STANDARD OF PROOF

The same standard of proof that was used at the Confirmation of Charges Stage—'sufficient evidence to establish substantial grounds to believe that the person committed each of the crimes charged'⁸ should be applied to this appellate proceeding before the AC.⁹ Thus, the AC must find that the Prosecution supplied PTC VI with “concrete and tangible proof demonstrating a clear line of reasoning underpinning [her] specific allegations.”¹⁰

⁶ *Gbagbo*, *supra* note 3, at ¶ 23.

⁷ Rules of Procedure and Evidence, *supra* note 5, at r. 158.

⁸ Rules of Procedure and Evidence, *supra* note 5, at r. 149.

⁹ Rome Statute, *supra* note 1, at art. 61(7).

¹⁰ *Prosecutor v. Bannister*, Decision on the confirmation of charges (Mar. 15, 2020), ¶ 29 [hereinafter *Bannister*].

WRITTEN ARGUMENTS

I. The Dragos posts on Statusphere do not constitute “direct and public incitement of genocide” under Article 25(3)(e) of the Rome Statute because they were neither direct nor public, the requisite genocidal intent cannot be established, the underlying crime of genocide did not occur, and the gravity required for admissibility is not met.

Under Article 25(3)(e) of the Rome Statute, criminal liability attaches when an individual: (1) directly incites others to commit genocide; (2) publicly incites others to commit genocide; and (3) intends to directly and publicly incite others to genocide.¹¹ Whether or not the underlying crime of genocide itself must be established is a issue of first impression. Given the statutory placement of incitement to genocide in Article 25 among the other modes of liability, and separated from the enumerated crimes, Valaria urges this Chamber to require that the Prosecution show that the underlying crime of genocide itself has occurred.¹² Genocide, under Article 6 of the Rome Statute, requires the perpetrator to destroy, in whole or in part, a national, ethnical, racial, or religious group, by killing members of the group or causing serious bodily or mental harm to members of the group.¹³

As the ICC has not yet addressed the definition of “incitement to genocide,” the Court may consider treaties, principles, and rules of international law pursuant to Article 21(1)(b) of the Rome Statute.¹⁴ As the International Criminal Tribunal for Rwanda (ICTR) is the primary source of jurisprudence addressing the issue of incitement to genocide, Valaria suggests the court

¹¹ Rome Statute, Art. 25(3)(e); *see also Prosecutor v. Nyiramasuhuko*, ICTR-98-42-A, ¶3338 Judgement (AC), (Dec. 14, 2015), (“A person may be found guilty of direct and public incitement to commit genocide . . . if he directly and publicly incited the commission of genocide and had the intent to directly and publicly incite others to commit genocide”).

¹² Rome Statute, Art. 25; *See also*, Fausto Pocar, *Symposium on the Rome Statute at Twenty: Transformation of Customary Law through ICC Practice*, 183 (2018) (pointing out that the Rome Statute categorizes incitement as a mode of criminal responsibility under Article 25, whereas the Genocide Convention categories incitement as a crime under Article III), https://www.cambridge.org/core/services/aop-cambridge-core/content/view/E3280DDA4C095469D7AC13110229B036/S2398772318000557a.pdf/transformation_of_customary_law_through_icc_practice.pdf.

¹³ Rome Statute, Art. 6.

¹⁴ Rome Statute, Art. 21(1)(b); *see also* Pocar *supra* note 12 (noting the ICC has interpreted Article 21 narrowly).

consider ICTR caselaw as a guide in analyzing this question, while remember that the ICTR statute differs from the ICC statute with regard to how it categorizes incitement.

A. *The meanings of the Dragos posts were ambiguous and therefore were not direct as required by Article 25(3)(e).*

Direct incitement is defined as speech that makes a direct appeal “specifically urging another” to take criminal action.¹⁵ The speech cannot be a vague or ambiguous suggestion.¹⁶ It follows that direct incitement to genocide must be speech specifically provoking another to “destroy, in whole or in part” a particular ethnic group—incitement to hatred alone is insufficient.¹⁷ The prosecution must show causation between the inciting acts and the specific offense of genocide.¹⁸ Speech that does not explicitly call for genocide may constitute direct incitement to genocide if, in its cultural, linguistic, and political context, the speech is understood by its intended audience as a call to genocide.¹⁹

For example, the ICTR recognized in *Bikindi* that loudspeaker broadcasts calling for the Hutus to “rise up and look everywhere possible” and not to “spare” any Tutsis unequivocally constituted a “direct call to destroy the Tutsi ethnic group.”²⁰ The court based its finding on both the unambiguous language *Bikindi* used, and the cultural context which allowed the messages to be understood as a call to wipe out the Tutsis. The genocidal context was created throughout years of civil war between the Hutus and Tutsis in which the Hutu majority disseminated propaganda via public speeches, radio broadcasts, and newspapers, calling for the violent elimination of the Tutsis and referring to the Tutsis as “enemy,” “cockroach,” and “snake.”²¹

¹⁵*Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-T, Trial Judgement, ¶852, (Dec. 1, 2003); *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgement, ¶ 557 (Sept. 2, 1998).

¹⁶ See *Prosecutor v. Nyiramasuhuko*, Case No. ICTR-98-42-T, Trial Judgement ¶ 5986 (Jun. 24, 2011); *Akayesu supra* note 15 at ¶ 557.

¹⁷ Rome Statute, Art. 6; *Prosecutor v. Bikindi*, ICTR-01-72-0048/1 Judgment, ¶ 388 (Dec. 2, 2008).

¹⁸ See *Akayesu*, *Akayesu supra* note 15 at ¶ 557.

¹⁹ See *Nyiramasuhuko supra* note 16 at ¶ 5986; see also *Bikindi supra* note 17 at ¶ 387-389.

²⁰ *Bikindi supra*, note 17 at ¶ 423.

²¹ *Bikindi supra*, note 17 at ¶ 387-389.

That cultural history and political climate facilitated the Rwandan public's understanding of the calls to commit genocide against the Tutsis.

In contrast, the songs Bikindi wrote, which were broadcast via radio, were found not to constitute direct and public incitement to genocide.²² Unlike Bikindi's loudspeaker statements, the songs were more ambiguous, in part because of their numerous possible translations: one song's title was translated as "I Hate the Hutu" by the prosecution, and "The Awakening" by the defense.²³ Similarly vast discrepancies arose in the court's findings of numerous possible translations of Bikindi's lyrics.²⁴ Ultimately, the songs were found to be too ambiguous because their messaging had many varying interpretations, and even while some translations included anti-Hutu hate language, none were direct enough to be considered a clear call for genocide.²⁵

The Dragos posts in this case do not rise to the level of "direct" incitement to genocide for two reasons. First, they were written in ambiguous language akin to the songs in *Bikindi*. And second, the cultural context in Solantis did not ensure the audience would understand the posts as a call to genocide as it did in Rwanda. The Dragos posts called for things like "cleaning up the widgets" and keeping the "widgets" out of power, neither of which can be directly read to call for the systematic extermination, in whole or in part, of the Starek people.²⁶ Like Bikindi's songs, the Dragos posts could be translated in different ways: for instance, the posts made referring to the elections were interpreted by Statusphere as a call to campaign and vote. There is no clear evidence that the intended audience understood the Dragos posts to specifically call for a genocide against the Stareks.

Second, unlike in Rwanda, where the Hutus and Tutsi were embroiled in an ongoing war creating a genocidal context, there was no such civil war between the Nothroki and Starek people in Solantis. While there may be a history of discrimination against the Starek people in Solantis, the cultural context in Solantis falls far short of the level of large scale, widespread, organized, and systematic anti-Tutsi propaganda and violence seen in Rwanda during the genocide. Without

²² *Id.* at ¶ 421.

²³ *Id.* at ¶ 188.

²⁴ *Id.* at ¶ 191.

²⁵ *Id.* at ¶ 421.

²⁶ *Bannister* at ¶8.

such a context, there is no evidence that the posts calling to “clean up” the “widgets” would directly and unequivocally be understood as genocide.²⁷ Because the Dragos posts were ambiguous, even when taken within the cultural context of Solantis, they fail to rise to the level of “direct” incitement to genocide as required under Article 25 of the Rome Statute.

B. *The Dragos posts occurred in a private social media group which could not be viewed by the general public, and therefore were not public as required by Article 25(3)(e).*

The travaux préparatoires of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide show that the Sixth Committee chose to remove references to “private” incitement (understood as “private messages”) and retain only “public” incitement (understood as “mass communication”).²⁸ This revision shows an intent to limit liability to inciting speech that is accessible to the public through mass communication systems and to protect the free speech of private citizens in private conversations.²⁹ In final form, the Convention’s language of “direct and public incitement to commit genocide” recognizes incitement “in public speeches or in the press, through the radio, the cinema or other ways of reaching the public.”

The ICTR considered two main factors when assessing whether speech is sufficiently public to constitute incitement: (1) the manner in which the speech was disseminated, and (2) whether the target audience was limited or not.³⁰ Examples of public incitement include public speeches made to open crowds, mass media messaging, and comments made over public address.³¹ The Appeals Chamber in *Nyiramasuhuko* noted that “all convictions before the Tribunal for direct and public incitement to commit genocide involve speeches made to *large*,

²⁷*Bikindi supra*, note 17 at ¶ 387-389.

²⁸ See Hiram Abtahi, Philippa Webb, *The Genocide Convention: The Travaux Préparatoires*, (2008); see also *Callixte Kalimanzira v. The Prosecutor*, ICTR-05-88-A, Judgement, at ¶ 158 (Oct. 20, 2010); *Nyiramasuhuko supra* note 16 at ¶ 5987 (discussing the removal of “private incitement” during the drafting of the Genocide Convention).

²⁹ See *Hiram supra* note 28 at 986, 1549, 1552; see also *Kalimanzira supra* note 28 at ¶ 158 (20 October 2010); *Nyiramasuhuko supra* note 16 at ¶ 5987.

³⁰ *Id.* at 3348.

³¹ *Bikindi supra*, note 17 at ¶ 387-389.

*fully public assemblies, messages disseminated by the media, and communications made through a public address system over a broad public area".*³²

In this case, the Dragos posts cannot be considered “public” because: (1) they occurred in a private forum and (2) the intended audience was narrow and exclusive.³³ First, the Dragos posts were made in a private affinity group on the Statusphere website.³⁴ Unlike the circumstances in *Bikindi* and *Nyiramasuhuko*, where the inciting speech was disseminated via public announcement systems such as blaring speakers driven through communities, public assemblies, and widespread radio broadcasts, the Dragos posts were buried in a private corner of the privately-owned Statusphere website.

Second, the posts were only visible to the limited group of individuals who had specifically joined the Dragos group on Statusphere. In order to access the Dragos posts, users had to undertake a complex series of registration steps: first, accessing a device that has internet; second, searching for the Statusphere website; and third, registering as a Statusphere user by clicking on the registration link and then creating a username and selecting a password.³⁵ Once registered, users then had to seek out the Dragos group, and click to opt into the group.³⁶ Finally, users had to create a second username to post anonymously within the group.³⁷ During the relevant time period, the Dragos group was made up of 4,000 users at most. That means that fewer than .04%³⁸ of the Statusphere’s users had access to the Dragos posts. Notably, there is no way to know whether the Dragos members in the Statusphere affinity group were located in Solantis or Valaria. Ultimately, the Dragos affinity group was simply too obscure and exclusive to satisfy the requisite public standard for incitement to genocide.

³² See *Nyiramasuhuko supra* note 16 at ¶ 5987 (emphasis added).

³³ *Bannister* at ¶ 7.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ Statusphere has 10 million users, whereas the Dragos group only has approximately 4,000 members, making up less than 1% of the online membership base. See *Bannister* at ¶4, 7.

C. *The requisite genocidal intent for incitement to genocide cannot be established.*

The prosecution cannot establish incitement to genocide because it cannot show the requisite mens rea which, in this case, requires establishing both the mens rea for incitement to genocide in the accused, and the mens rea for the underlying crime of genocide in the audience on the receiving end of the inciting statements. Said differently, if the prosecution cannot prove that genocide occurred as a result of the Dragos posts, then it is impossible to establish that the Dragos posts themselves can meet the mens rea for incitement.

The Rome Statute defines genocide as any of a number of acts committed with the purpose of destroying, in whole or in part, a national, ethnical, racial or religious group.³⁹ The elements of genocide under the Rome Statute include:

- (1) Killing two or more persons.
- (2) Such persons belonged to a particular national, ethnical, racial or religious group.
- (3) The perpetrator intended to destroy, in whole or in part, that national, ethnical, racial or religious group, as such.
- (4) The conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction.⁴⁰

Neither Article 25 of the Rome Statute nor prior ICC caselaw define the requisite mens rea for incitement to genocide.⁴¹ The ICTR has applied a “specific intent” mens rea, requiring a showing of the intent to commit the underlying crime of genocide.⁴² The specific intent to commit genocide is defined as acting with the purpose of destroying, in whole or in part, a national, ethnic, racial, or religious group, by killing members of the group.⁴³ Valaria urges the ICC to adopt a specific intent mens rea.

³⁹ Rome Statute, Art. 6.

⁴⁰ ICC Elements of Crimes, Art. 6(a).

⁴¹ See Rome Statute, Art. 25(3)(e).

⁴² See *Akayesu supra* note 15 at ¶ 560; see also *Prosecutor v. Muvunyi*, ICTR-2000-55A-T, Judgment, ¶ 485 (Sept. 12, 2006) (requiring a finding that the speaker have a specific intent to commit genocide).

⁴³ Rome Statute, Art. 6.

The Specific genocidal intent is difficult to prove without a confession. The *Akayesu* Court recognized a variety of factors from which intent may be inferred, including: a series of culpable acts “systematically directed against” the same group; “the scale of the atrocities;” and “deliberately targeting victims on account of their membership of a particular group, while excluding the members of other groups.”⁴⁴

The events surrounding the Solantis elections are helpful in illustrating that the facts here are insufficient to establish the requisite mens rea. First, the Dragos posts were not systematic—they were a few isolated posts, and the post referring to the election was interpreted by some members of the target audience to be sure to vote. Additionally, the violence that occurred on Solantis’ election day was disorganized, indiscriminate shooting that ultimately resulted in deaths of both Stareks and Nothrokis.⁴⁵ While the acts on election day were undoubtedly violent, the resulting deaths were not exclusively Starek, and the perpetrators acted indiscriminately rather than systematically, as required to infer an intent to destroy, in whole or in part, the Starek people.⁴⁶

The evidence shows neither that a genocide occurred in Solantis perpetrated by individuals who had an intent to destroy the Starek population in whole or in part, making it impossible to establish the mens rea required for incitement to genocide. However, should this Chamber elect not to find that incitement is a mode of liability as it is listed in the Rome Statute but rather an inchoate crime, the mens rea still is not satisfied. There is simply insufficient evidence to demonstrate that Dragos posts were made with the requisite purpose to provoke others to destroy the Starek population.

D. The Dragos posts cannot constitute incitement to genocide because the underlying crime of genocide has not occurred, as the Court should require.

Article 25(3)(e) of the Rome Statute is substantively identical to Article III(c) of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, and to the relevant provisions of the statutes of the International Criminal Tribunal for the former Yugoslavia

⁴⁴ See *Akayesu* *supra* note 103 at ¶ 523.

⁴⁵ *Bannister* at ¶ 15.

⁴⁶ *Id.*

(ICTY) and ICTR Statutes.⁴⁷ The Rome Statute, however, diverges from the Genocide Convention and the ICTR and ICTY statutes in categorizing incitement to genocide under Article 25 with other modes of liability.⁴⁸ In contrast, Article III of the Genocide Convention, Article 2(3) of the ICTR statute, and Article 4(3) of the ICTY statute all categorize incitement to genocide as a separate inchoate crime, such that the further crime of genocide need not occur for the purpose of establishing incitement.⁴⁹ Valaria urges this court to interpret “incitement to genocide” as it appears in the Rome Statute.

Had the drafters of the Rome Statute wanted to, they could have adopted the text of the Genocide Convention, ICTR, and ICTY statute. Instead, however, they took a different approach. To enforce the ICC statute in alignment with the language on its face, the court should recognize “incitement” as a mode of liability and require the prosecution show genocide occurred in order for incitement to genocide to be committed. Doing so would honor the intent of the drafters’ in diverging from the other aforementioned statutes. While the UNHCHR has reported on the violence against the Stareks in Solantis, it has not found that a genocide has occurred under Article 6 of the Rome Statute. As such, the crime of “incitement to genocide,” cannot be established. The ICC was created to enforce the gravest crimes, and finding that the Dragos posts constitute incitement when no genocide has occurred is a distortion of the intent of the Rome Statute.

E. The posts on Statusphere were not sufficiently grave to meet Article 17 of the Rome Statute’s requirements for admissibility.

Article 17(1)(d) of the Rome Statute explains that a case before the court is “inadmissible where the case is not of sufficient gravity to justify further action by the Court.”⁵⁰ Factors considered in determining gravity include the culpability of the actors in question, and the impact

⁴⁷ Rome Statute, Art. 25; United Nations, General Assembly, *Convention on the Prevention and Punishment of Crime of Genocide*, Art. III(c) (Dec. 9, 1948) [hereinafter Genocide Convention]; United Nations, Security Council, *Statute of the International Criminal Tribunal for the Former Yugoslavia*, Art. 2(3) (as amended on May 17, 2002)[hereinafter ICTY]; United Nations, Security Council, *Statute of the International Criminal Tribunal for the Rwanda*, Art. 4(3) (as amended on Oct. 13, 2006)[hereinafter ICTR].

⁴⁸ Rome Statute, Article 25(3)(e).

⁴⁹ Genocide Convention, Article III; ICTY(4)(2); ICTR(2)(3).

⁵⁰ Rome Statute, Art. 17(1)(d)

of conduct before the court. Because of the posters lack of culpability and the low impact the posts had on the situation in Solantis, the PTC erred in its decision that the posts were of sufficient gravity to constitute incitement to genocide.

In its decision regarding the Kenya situation, the Appeals Chamber rejected a three pronged test proposed by the PTC.⁵¹ The Court did explain that gravity could be assessed by considering the need for preventative or deterrent action by the court in order to stop the most serious of crimes from happening, as well as the role of those involved.⁵² The Court stated that these factors were not determinative but were considerations that the Court used to decide if sufficient gravity existed.⁵³ The Office of the Prosecutor further explained that qualitative factors to be considered in determining gravity included impact of conduct, and the degree of culpability belonging to the actors.⁵⁴

Punishing the posts in the Statusphere group would not achieve the kind of preventative goals that the Court has sought to achieve because the posters are not the culpable actors in this situation. Most of the posts in question are only connected to random acts of violence within Solantis. Posts that pointed to four election locations don't show that the posts helped organize hundreds of armed individuals travelling together to elections sites at the same time. Seeking the random individuals that posted these messages does nothing to deter the acts like the planned election day violence. For similar reasons, the impact of the posts was minimal, and the writers should not be the targets of the ICC.

II. Even if this Chamber finds that the Dragos posts constituted incitement to genocide, Dr. Bannister cannot be held individually liable for either inciting genocide or providing means to incite genocide under Article 25(3) of the Rome Statute because she performed no acts or omissions with the requisite genocidal intent.

The PTC VI erred in finding that Dr. Bannister's failure to "immediately remove" the Dragos posts and "prevent" reposting on Statusphere render Dr. Bannister criminally liable under

⁵¹ *Decision on the Prosecutor's Application for Warrants of Arrest, Article 58, Case No. ICC-01-04-168-US-Exp, ¶ 74-76* (July 13, 2006).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Regulations of the office of the prosecutor ICC-BD/05-01-09 Reg.29-2.

Article 25(3)(c) and (e). Individual criminal liability attaches for the commission of a crime where the accused either “physically perpetrated the criminal act or personally failed to act when required to do so under law.”⁵⁵ In order to establish individual criminal liability by omission, four elements must be satisfied: (1) that the accused had a legally recognized duty to act, (2) that the accused had the ability to act, (3) that the accused failed to act, with the intent to commit the crime, and (4) that this failure resulted in the commission of the alleged crime.⁵⁶ For the crime of aiding and abetting incitement, the conduct at issue must be “essential,” meaning the alleged crimes could not have otherwise occurred. In this case, the first element cannot be established because Dr. Bannister had no legally recognized duty.

A. *Even assuming there were reasonable grounds to find that the Dragos posts constituted incitement to genocide, Dr. Bannister cannot be held liable for incitement under Article 25(3)(e) of the Rome Statute because the social media posts at issue were created by third party actors and she had no legal duty to remove them.*

Dr. Bannister is not liable for incitement to genocide under either theory of liability - affirmative acts or omissions. In *Nahimana*, the ICTR found that publishers of mass media, like newspapers and radios, may be held accountable for incitement when they have “control” or power to “shape the editorial direction” of the messages they are publishing, and purposefully publish illegally inciting messages rather than neutral news sufficiently distanced from inciting remarks.⁵⁷ In *Bagambiki*, the ICTR found that although Bagambiki, the highest ranking local government official in his community, had a legal duty under Rwandan national civil law to protect civilians within his town, he had no duty under criminal law.⁵⁸ Thus, any finding that he failed to discharge his civil duty by refusing to assist individuals whose lives were in danger could not result in individual criminal liability.⁵⁹

First, the Rome Statute does not impose individual criminal liability for incitement to genocide when the alleged inciting statements were made by a third party, except under Article

⁵⁵ *Prosecutor v. Blagojević*; IT-02-60, Judgment Blagojević ¶ 694 (May 9, 2007).

⁵⁶ *See Prosecutor v. Bagambiki*, Case No. ICTR-99-46-Tt, at ¶ 659 (Jul. 7, 2006); *see also Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgment at ¶ 41 (Dec. 6, 1999).

⁵⁷ *Prosecutor v. Nahimana*, ICTR-99-52-T, ¶ 123, Judgment and Sentence (Dec. 3, 2003).

⁵⁸ *See Bagambiki supra* at ¶ 659.

⁵⁹ *See Id.* at ¶ 658, 660.

28 in which there is a recognized superior / subordinate relationship, which is not the case here.⁶⁰ The alleged connection between Dr. Bannister's leadership of Statusphere and the Dragos posts is far too attenuated for criminal responsibility to attach.

Second, Dr. Bannister's situation surpasses that of the *Bagambiki* defendant in that not only did Dr. Bannister have no criminal duty to remove the Dragos posts, but she also had no civil duty to do so. Neither Valarian law nor international criminal law require that website owners screen, censor, and remove certain speech from their online platforms.⁶¹ Thus, the first prong of liability by omission fails. As such, the question of whether Dr. Bannister failed to remove such posts with the aim of inciting genocide is irrelevant, as she had no legal duty to take action in the first place.

As CEO of Statusphere, Dr. Bannister had no legal duty to the people of Solantis to take down the Dragos posts. Nevertheless, Dr. Bannister did remove the Dragos posts when made aware of them, and continued to enforce the Statusphere community safety policy of screening for violent posts.⁶² The posts at issue were removed swiftly and Dragos groups were closed by the Statusphere team once they were made aware of the issues.

Dr. Bannister cannot be held individually liable for incitement to genocide under Article 25 of the Rome Statute because there was no legal duty that she failed to discharge, and her maintenance of the Statusphere platform does not constitute direct and public incitement to genocide.

B. *Dr. Bannister cannot be held liable for providing the means for incitement to genocide under Article 25(3)(c) of the Rome Statute because she lacked the requisite genocidal intent and did not purposely facilitate incitement to commit genocide.*

Under Article 25(3)(c) of the Rome Statute, liability for aiding and abetting incitement to genocide attaches when a person "aids, abets or otherwise assists" in the commission of incitement to genocide, with the "purpose of facilitating" the crime.⁶³ Aiding is defined as

⁶⁰ Rome Statute, Art. 28.

⁶¹ *Bannister* at ¶ 18.

⁶² *Bannister* at p. 9-10, Transcript of Interview with Cersei Bannister by Jonah Morman, Solantis Gazette, (17 June 2019).

practical assistance; abetting is defined as facilitating the commission of a crime.⁶⁴ For example, in *Ntakirutimana*, the ICTR found the defendant liable for transporting armed attackers directly to locations where Tutsi refugees were hiding, to constitute aiding and abetting the commission of genocide.⁶⁵

The mens rea required under Article 25(3)(c) is acting with the “purpose of facilitating” the crime.⁶⁶ In *Mbarushimana*, the ICC distinguished the mens rea and actus reus required for aiding and abetting under the Rome Statute from that used by the ad hoc tribunals.⁶⁷ While the ad hoc tribunals do not require that the aider and abettor share the same intent to commit the crime as the perpetrator, the ICC Statute raises the aider and abettor’s mens rea to acting “with the purpose of facilitating the commission of that crime.” However, whether the ad hoc tribunals’ heightened “substantial contribution” requirement for the actus reus of aiding and abetting should be applied by the ICC has been left open.⁶⁸

Dr. Bannister cannot be held liable for aiding and abetting incitement to genocide because she lacked the requisite mens rea. First, Dr. Bannister understood the Dragos posts to be nonviolent calls to things like campaigning to vote or seeing the spiritual light.⁶⁹ Without understanding the posts as a call to violence, Dr. Bannister could not have maintained Statusphere with the intent to facilitate direct and public incitement to genocide. Dr. Bannister’s only intent was to maintain a social networking platform.

Second, even if she had understood the posts, her actions of maintaining the Statusphere website did not facilitate or “substantially contribute” to the commission of incitement. In fact, Dr. Bannister’s screening and regular removal of the implicated Dragos groups worked to

⁶³ Rome Statute, Art. 25(3)(c); *see also Prosecutor v. Mbarushimana*, ICC-01/04-01/10, Decision on the Confirmation of Charges, ¶ 281 (Dec. 16, 2011) (distinguishing the mens rea and actus reus of aiding and abetting under the ICC from the Ad Hoc tribunals).

⁶⁴ *Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgment, ICTR-96-10-A and ICTR-96-17-A, ¶ 787 (Dec. 13, 2004).

⁶⁵ *Id.*

⁶⁶ Rome Statute, Art. 25(3)(c).

⁶⁷ *See Mbarushimana supra* note 58 at ¶ 281 (distinguishing the mens rea and actus reus of aiding and abetting under the ICC from the Ad Hoc tribunals).

⁶⁸ *See Id.*

⁶⁹ *Bannister* at ¶ 16; *Id.* at App. 1, p. 10.

undermine and prevent any alleged incitement from occurring on the Statusphere platform. Dr. Bannister did not encourage the Dragos group to create these posts, tell them what to type, sign them up for Statusphere, or provide them free computers to use. Unlike the defendant in *Ntakirutimana*, Dr. Bannister’s alleged actions are ar too indirect and removed from the alleged crime to constitute facilitation of, let alone a substantial contribution to, incitement to genocide.⁷⁰

Even if the Court finds that the Dragos group used the Statusphere website to allegedly “incite” genocide, none of Dr. Bannister’s actions were undertaken with the intent to facilitate such incitement. For these reasons, Dr. Bannister cannot be held individually able for aiding and abetting the Dragos group in inciting genocide.

C. Holding Dr. Bannister liable for third-party posts on Statusphere would violate international public policy by limiting free speech online and inappropriately deputizing non-State actors to police free speech.

Under international public policy, Dr. Bannister should not be held liable for the alleged crimes, for two reasons: (1) doing so infringes upon free speech and (2) doing so would inappropriately require private entities to censor free speech.

Free speech is an established, and well-supported interest of international public policy.⁷¹ It is antithetical to the international protection of free speech to force private entities to police and censor speech online.⁷² The creation of the internet and subsequent development of social media websites has both facilitated and extended access to the right to free speech. Websites like Statusphere provide forums for individuals to share their thoughts and beliefs, including members of marginalized communities who may otherwise lack platforms to express their views.

⁷⁰ *Ntakirutimana supra* note 59 at ¶ 787.

⁷¹ *See, e.g.* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948). “Human beings shall enjoy freedom of speech and belief and freedom”; *see also* International Covenant on Civil and Political Rights, Art. 19: “1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”

⁷² *See* Emma Irving, Suppressing Atrocity Speech on Social Media, 113 AJIL Unbound 256, 260 (2019): “First, increased legal pressure on social media companies to suppress certain types of content can lead to the over removal of content. As social media companies are guided by economic considerations, there is a significant risk that they will prioritize avoiding liability over the protection of free speech, and so remove more content than is warranted.”

Penalizing website owners like Dr. Bannister for the posts of third-party users will have an inevitable chilling effect on free speech. Statusphere has a staff of only eighteen people, but nonetheless works to screen the posts made by its ten million users for safety purposes in alignment with its community standards. However, exposing Statusphere owners and employees to criminal liability for failure adequately to screen posts would have devastating consequences. Specifically, online forums for exchanging ideas will shutter under the burden of potential criminal liability for every single third-party post. As seen in this case, screening techniques are imperfect, especially for small, startup companies. Therefore, to avoid liability, websites that remain open will be forced to censor sweeping topics and types of language, curtailing free speech and eliminating the aforementioned benefits they provide.⁷³

A ruling from this court affirming the PTC VI's findings will have far-reaching collateral consequences that undermine state sovereignty. Deputizing privately owned internet platforms to arbitrarily censor the posts of users would do a grave injustice, to both state sovereignty and the free speech rights of global citizens. Valaria has an interest in protecting the free speech rights of its citizens, including free speech online. Determining if and under what circumstances online speech is censored should be a matter for States to decide, for the purposes of standardization, equitable enforcement, and public policy.

III. The ICC lacks jurisdiction under Article 12 of the Rome Statute because any relevant acts occurred in Dr. Bannister's State of nationality, Valaria, a non-party State, and the fact that Statusphere can be accessed online in other States does not provide a legal basis to establish jurisdiction.

The ICC's jurisdictional reach is rooted in two theories: territoriality and nationality. Article 12 of the Rome Statute grants the ICC jurisdiction over situations in which the "conduct in question" was committed either: (1) within the territory of a State Party to the Rome Statute; or (2) by a national of a State Party.⁷⁴ If, however, the alleged crime occurred on a non-Party State's territory, or implicated a citizen of a non-Party State, the ICC may only exercise

⁷³ *Id.*

⁷⁴ Rome Statute, Art. 12; *see also Prosecutor v. Ngudjolo Chui*, 14 (ICC-01/04-02/07), Decision on the Evidence and Information Provided by the Prosecution for the Issuance of a Warrant of Arrest for Mathieu Ngudjolo Chui, ICC Pre-Trial Chamber I, ¶ 9 (Jul. 6, 2007) (conceptualizing two grounds for jurisdiction under Rome Statute), https://www.icc-cpi.int/CourtRecords/CR2008_01208.PDF.

jurisdiction if the non-Party State explicitly accepts the Court’s exercise of jurisdiction or the situation is referred to the Prosecutor by the United Nations Security Council pursuant to Article 13(b), neither of which occurred here.⁷⁵

A. *The preconditions for jurisdiction were not met because Dr. Bannister is a Valarian national, the “conduct in question” occurred in Valaria, Valaria has not accepted the ICC’s exercise of jurisdiction, and the situation was referred to the prosecutor by Solantis.*

Pre-Trial Chamber VI erred in finding jurisdiction for two reasons: first, the “conduct in question” did not occur on the territory of a State Party; and second, the accused is not a national of a State Party. When a situation is referred to the ICC by a State Party, as it was here, these preconditions must have been satisfied for the Court to exercise jurisdiction.⁷⁶ Because Dr. Bannister is unquestionably a Valarian national, the only issue is whether the “conduct in question” occurred on the territory of a State Party.

For the ICC to establish territorial jurisdiction, the “conduct in question” must have occurred on the territory of a State Party.⁷⁷ In the recent, controversial *Myanmar* decision regarding the alleged deportation of the Rohingya Muslims from Myanmar into Bangladesh, ICC PTC I found that, in the case of the crime of deportation, only one element of the alleged crime need to have occurred on the territory of the state party.⁷⁸ Pre-Trial Chamber I based that decision on the “inherently transboundary” nature of the crime of deportation, explaining that, in the unique case of deportation which requires a border-crossing, the requisite it is impossible for all elements of the crime to occur on one territory.⁷⁹ In *Myanmar*, the border crossing element occurred in Bangladesh, a State Party, and the ICC found that element was sufficient for the ICC to legally exercise jurisdiction.⁸⁰ This Court, however, should not apply this controversial rule

⁷⁵ Rome Statute, Art. 13(b).

⁷⁶ Rome Statute, Art. 12.

⁷⁷ *Id.*

⁷⁸ *Situation in Myanmar*, ICC Pre-Trial Chamber I, Decision on the “Prosecutor’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,” ICC-RoC46(3)-1/18, ¶ 64 (Sept. 6, 2018).

⁷⁹ *Id.* at ¶ 71.

⁸⁰ *Id.*

for two reasons: first, this case does not involve an “inherently transboundary crime” like that in *Myanmar* and second, it is not bound by the *Myanmar* decision.

The instant case differs from the situation in *Myanmar* because the alleged crimes lack the inherent transboundary nature relied upon by PTC I in finding grounds for jurisdiction. Dr. Bannister is charged with direct and public incitement to genocide under Article 25(3)(e), and aiding and abetting incitement to genocide under Article 25(3)(c) of the Rome Statute.⁸¹ Unlike the crime of deportation, incitement to genocide does not necessitate the crossing of a border, and the “conduct at issue” in this case all occurred within the territory of Valaria.

There is no evidence in the record indicating that during the time period at issue, January 2018 to January 2020, Dr. Bannister was physically located anywhere other than Valaria.⁸² Any actions she undertook during that period in her role as CEO of Statusphere occurred within the territory of Valaria.⁸³ Statusphere is headquartered in Valaria, and its servers are located entirely in Valaria.⁸⁴ Any and all messages posted by third party users of the website were stored on and routed through the server in Valaria. Thus, to the extent Dr. Bannister undertook any relevant alleged act or omission, she did so within the territory of Valaria. Further, the Dragos messages at issue in this situation were, at minimum, housed on the server in Valaria. Beyond that, there is no evidence indicating that the Dragos posts were actually crafted or published by individuals located on the territory of a state party, should that conduct be relevant.

Furthermore, Valaria did not accept exercise of jurisdiction as the ICC requires of non-Party States. Under Article 12 of the Rome Statute, to proceed with the prosecution before the ICC, Valaria must first “express[ly]” and “unequivocal[ly]” authorize and accept the ICC’s exercise of jurisdiction.⁸⁵ Valaria, however, has unequivocally refused the ICC’s exercise of

⁸¹ *Bannister* at ¶ 1.

⁸² *See generally Bannister*.

⁸³ *Id.* at ¶ 6.

⁸⁴ *Id.* ¶ 6.

⁸⁵ *See* Rome Statute, Art. 12; *Situation in the Republic of Côte d’Ivoire*, ICC-02/11, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Republic of Côte d’Ivoire, Pre-Trial Chamber III, ¶ 10 (Oct. 3, 2011) (Côte d’Ivoire, a non-Party State, submits declaration accepting jurisdiction of the ICC to investigate and prosecute crimes), <https://www.legal-tools.org/doc/7a6c19/pdf>; *see also* Bourgon & Kaul *supra* note 67, at 543-552 (providing that for a non-Party State to accept jurisdiction, such acceptance must be “express” and “unequivocal”).

jurisdiction because it has a strong interest in maintaining its sovereignty, protecting its citizens, and promoting its public policy supporting free speech. And lastly, the only remaining means to establish jurisdiction under the facts of this case would be for the United Nations Security Council to refer the situation to the prosecutor which has not occurred.⁸⁶

- B. *Neither the “effects” in Solantis nor “the cyberspace connection” between Solantis and Dr. Bannister’s acts in Valaria form a basis for jurisdiction, and finding otherwise would circumvent the jurisdictional limits of the Rome Statute and violate international public policy.*

Pre-Trial Chamber VI erred in its finding that the “cyberspace connection between the actions of Dr. Bannister and the effects that occurred in Solantis” form the basis for Article 12(2) jurisdiction for two reasons. First, effects are not a recognized ground for jurisdiction under the Rome Statute.⁸⁷ Second, using the internet connection between Valaria and Solantis to establish jurisdiction would essentially grant the ICC universal jurisdiction, undermining both the Rome Statute and international principles of state sovereignty. The ICC’s jurisdiction is intended to be limited to those States which have ratified the ICC Statute to honor state sovereignty; allowing cyberspace connections to serve as a basis for territoriality would undermine that policy.

- i. *C. The Rome Statute does not recognize “effects” as a ground for jurisdiction and finding otherwise violated the legislative intent to limit the scope of the Court’s jurisdiction.*

Any “effects” in Solantis of the alleged crimes are irrelevant with regard to jurisdiction because, under Article 12 of the Rome Statute, jurisdiction is limited to the territory where the conduct occurred and nationality of the accused.⁸⁸ The drafters of the Rome Statute could have included the effects doctrine as a means of establishing jurisdiction had they wanted to, but chose

⁸⁶ See Rome Statute, Art. 13(b).

⁸⁷ See Rome Statute, Art. 12.

⁸⁸ See Rome Statute, Art. 12; see also Zimmerman & Klamberg, Comments, Rome Statute, Art. 12, ICC Case Matrix (last visited Nov. 16, 2019), <https://www.casematrixnetwork.org/cmn-knowledge-hub/icc-commentary-clicc/commentary-rome-statute/commentary-rome-statute-part-2-articles-11-21/#c1983>; Vienna Convention on the Law of Treaties, Art. 34 (May 23, 1969) (“A treaty does not create either obligations or rights for a third State without its consent”), <https://www.legal-tools.org/doc/6bfcd4/pdf>.

instead to limit the court’s jurisdictional reach.⁸⁹ Choosing not to include other widely accepted bases for jurisdiction, such as passive personality jurisdiction, is a further indication that the drafters intended the Court’s reach be sufficiently circumscribed to the bases listed under the Statute.

Had the drafters intended the ICC to have effects jurisdiction, they would have included it in the Statute. Just as effects doctrine does not appear in the Rome Statute, nor does it appear generally in other sources of international criminal law. Rather, effects jurisdiction is recognized primarily within the context of domestic courts and civil matters arising under domestic statutory schemes, and rarely in the context of international crimes like those over which the ICC has jurisdiction.⁹⁰

For example, in the historic 1926 *Lotus* case, the International Court of Justice found that Turkey could assert domestic jurisdiction over a French nationals for a crime that occurred on the open seas, because it affected Turkey (damaging a Turkish ship and harming Turkish nationals).⁹¹ The *Lotus* case arose under Turkish domestic law rather than an international treaty or statute, and came to stand for the concept that sovereign States may exercise jurisdiction in any manner not explicitly prohibited by international law.⁹² The situation in *Solantis*, however, does not arise under domestic law, and it does not implicate the exercise of domestic jurisdiction. Rather, it is before the ICC, and the ICC’s governing statute simply does not permit jurisdiction on the basis of effects.

The finding of jurisdiction in the Myanmar case is instructive: Pre-Trial Chamber I found that jurisdiction was established not because of the “effects” the alleged crime had in Bangladesh.⁹³ Rather, jurisdiction was based on territoriality, relying on the fact that an element

⁸⁹ *Id.*; see also Draft Statute for an International Criminal Court with Commentaries, United Nations at 42-43, ¶ 6, 8-9 (1994).

⁹⁰ See, e.g. *The Case of the S.S. “Lotus”*, Permanent Court of International Justice 5, 13 (Sept. 7, 1927); *Yahoo! Inc. v. La Ligue Contre Le Racisme Et L’Antisemitisme*, 379 F.3d 1120, 2004 U.S. App. LEXIS 17869, 32 Media L. Rep. 2185 (9th Cir. 2004) (permitting France domestic courts to exercise jurisdiction over a U.S. company for its effects in France); *Hartford Fire Insurance Co. v. California*, 509 U.S. 764 (1993) (permitting the enforcement of U.S. domestic law over U.K.-based insurance companies for effects in U.S.) .

⁹¹ *The Case of the S.S. “Lotus”*, Permanent Court of International Justice 5, 13 (Sept. 7, 1927).

⁹² *Id.*

⁹³ *Decision on the “Prosecutor’s Request for a Ruling on Jurisdiction under Article 19(3) of the Statute,”* ICC Pre-Trial Chamber I, ¶ 64 (ICC-RoC46(3)-1/18) (Sept. 6, 2018).

of the crime of deportation occurred in Bangladesh: the border crossing.⁹⁴ The *Myanmar* Court could have expanded Article 12 jurisdiction to include the effects of the alleged crime, as Bangladesh was dramatically affected by the influx of Rohingya refugees.⁹⁵ Instead, however, the Court stayed within its authority by linking its “one element” rule to the theory of territoriality.⁹⁶ While the one-element rule is not applicable in the instant case, this Court should similarly honor the jurisdictional limits of the Rome Statute.

- ii. *D. Relying on the internet connection between Valaria and Solantis for the purpose of jurisdiction would provide the ICC unlimited, worldwide jurisdiction, infringing upon state sovereignty.*

The Court should not rely on the “cyberspace connections” between Valaria and Solantis as a means for establishing territorial jurisdiction. Doing so would expand the Rome Statute’s bases for jurisdiction to include essentially any location with an internet connection, regardless of where the elements of the crimes occurred or whether the States implicated were Parties to the treaty. Principles of State sovereignty will be undermined by such a drastic expansion of the ICC’s jurisdiction.

Because there are no sources of international criminal law addressing this type of cyber issue, international civil case law analyzing the European Union’s internet privacy law, the General Data Protection Regulation (GDPR), commonly known as the “right to be forgotten,” is illustrative. In the 2019 landmark case, *Google v. CNIL*, the European Court of Justice held that even though the internet is ubiquitous and connects nearly all states across the globe, Google has no obligation to apply the EU’s “right to be forgotten” globally, in particular because no provision in the GDPR statute provides for such extraterritorial enforcement upon non- EU States.⁹⁷ In deciding this case, the Court considered state sovereignty and the competing policy

⁹⁴ *Id.* at ¶ 71 (“As discussed, an element of the crime of deportation is forced displacement across international borders, which means that the conduct related to this crime necessarily takes place on the territories of at least two States.”).

⁹⁵ *Id.*

⁹⁶ *Id.* at ¶ 71.

⁹⁷ *Google LLC v. Commission nationale de l’informatique et des libertés*, ¶ 36, 47, ¶ 79, Court of Justice, Case C-507/17, (Jan. 10, 2019).

issue of public access to information, finding that the EU “right to be forgotten” is not absolute and that the interests of non-EU States favoring public access cannot be curtailed through universal enforcement of the EU policy.⁹⁸ The lesson from *Google* is that sovereign States that opt not to promulgate certain policies or laws, or opt not to ratify certain treaties, cannot then be subjected to such laws simply due to the universal nature of the internet.⁹⁹ In this case, we urge the ICC to follow the rationale of the EU Court of Justice and reject the cyber connection between Valaria and Solantis as a basis for jurisdiction. The ICC will play an essential role in preventing the internet from being used as an excuse to infinitely expand the jurisdictional reach of the court in violation of state sovereignty principles.¹⁰⁰

⁹⁸ *Id.* at ¶ 36, 47.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at ¶ 36, 47.

CONCLUDING SUBMISSIONS

Wherefore in light of the questions presented, arguments advanced, and authorities cited, the State of Valria respectfully requests this Court to adjudge and declare that:

- I. The PTC VI erred in finding substantial grounds to believe any of the Dragos posts made on Statusphere constituted direct and public incitement of genocide under Article 25(3)(e).
- II. The PTC VI erred in finding Dr. Bannister may be held individually criminally liable for incitement to genocide under Article 25(3)(e) and aiding and abetting incitement to genocide under Article 25(3)(c).
- III. The PTC VI erred in finding the ICC has jurisdiction to prosecute Dr. Bannister based on either effects in Solantis or the cyberspace connection between Solantis and Valaria.

On Behalf of the State of Valaria

Counsel for Valaria

BACK COVER
